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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1105

ARTHUR DELLA ROCCA, Petitioner,

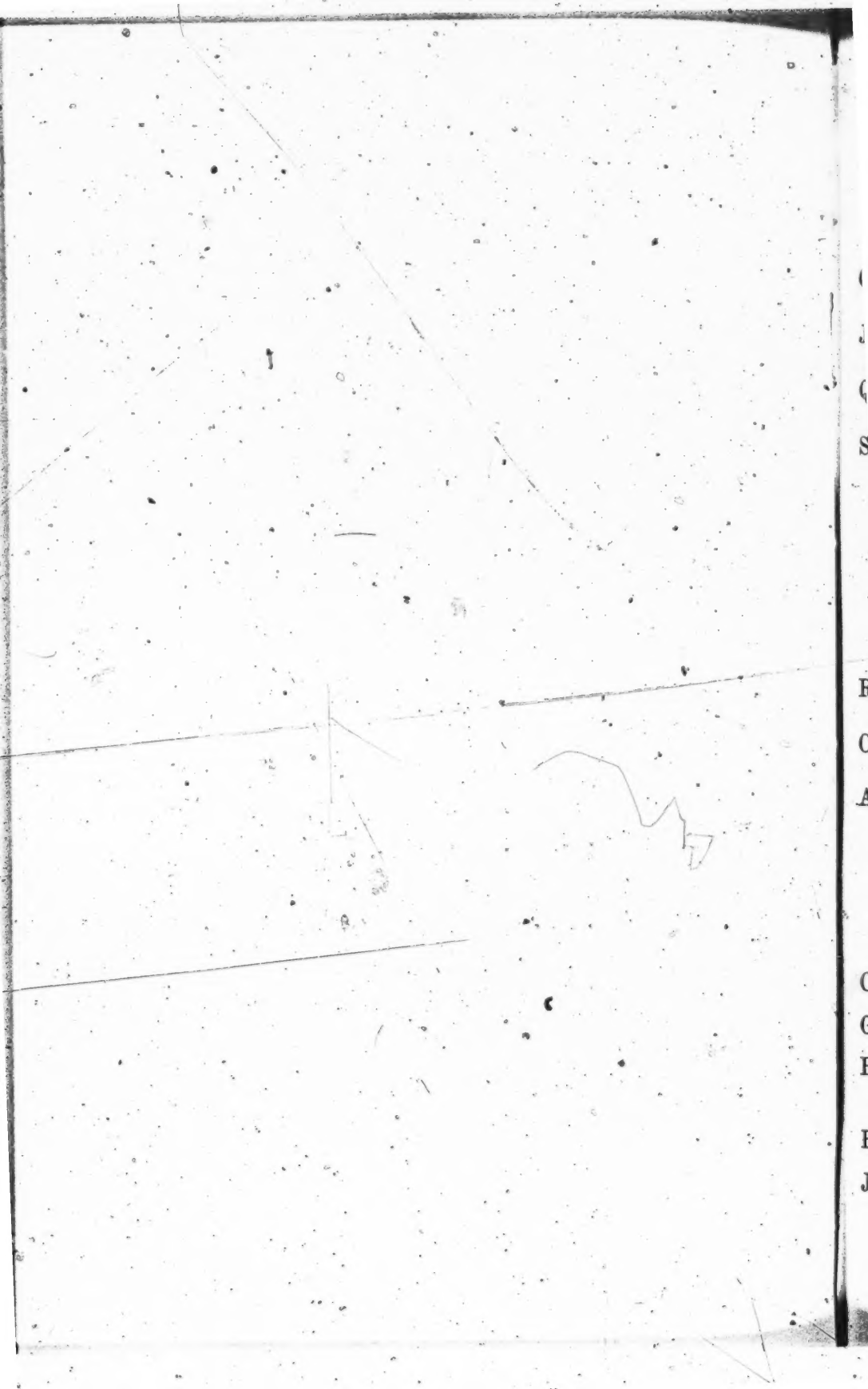
v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JEROME LEWIS,
Counsel for Petitioner,
250 Broadway,
New York, N. Y. 10007.

JEROME LEWIS,
THOMAS R. NEWMAN,
Of Counsel.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

ARTHUR DELLA ROCCA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Arthur Della Rocca, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 19, 1968, which unanimously affirmed the judgment of conviction entered in the United States District Court for the Southern District of New York on May 15, 1967.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (Appendix A) is not yet reported.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 19, 1968.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Questions Presented

1. Does the Fifth Amendment bar petitioner's conviction for possession of a firearm upon which the tax had not been paid and other related violations of the National Firearms Act, where petitioner could not have complied with the Act without disclosing his possession of a submachine gun, a felony under New York law?

2. Does the introduction in evidence during the Government's case-in-chief of damaging admissions extracted from petitioner by judicial compulsion, over objection, during his cross examination on a pretrial motion to suppress violate his Fifth Amendment privilege against self-incrimination and right to due process?

3. Does the Government's unexcused delay for more than six years in bringing this case on for trial violate petitioner's Sixth Amendment right to a speedy trial as a matter of law, requiring dismissal of the indictment?

Statement

Petitioner's possession and transfer of a firearm.

In September, 1959, petitioner, then 21 years old, and co-defendant Ellner, his former employer, each put up $100 to buy a "plugged up" or deactivated machine gun which Ellner thought he could resell for $400 to an in-

dividual known as "Frenchy" (A40a-41a).* "Frenchy," however, turned out to be a paid informer named Charles Martel who was working with the Government's undercover agents (A27a, A31a). He never intended to buy the gun and "reneged on the transaction" (A42a), leading Ellner and petitioner to believe that they would lose their investment.

On December 17, 1959, Ellner called petitioner, told him that he had a buyer for the gun and asked petitioner to join him that evening (A42a). Petitioner agreed, and at 7:30 p.m. on December 17, 1959, he accompanied Ellner to a meeting with the informer "Frenchy" and Government undercover agents McVeigh and Kales (A31a, A42a). This was the first time petitioner met or spoke to any of these men (A42a). He had no prior knowledge of Ellner's dealings with "Frenchy" or McVeigh (A43a).

According to the *undisputed* testimony of the Government agents, when petitioner met them at 7:30 p.m. he offered to sell them an *inoperable* gun, the barrel of which was plugged up with a steel weld (A28a-29a, A32a-34a). Such a gun is not a firearm within the meaning of the statute. The agents, therefore, were not interested in buying the deactivated gun (A36a). As Agent Kales was forced to concede (A36a):

> "*If I accepted this welded gun,* I would have to pay $200 for it, and if I paid $200 for a welded-up gun, and it had been properly registered, *there would not have been a violation of the National Firearms Act.*" (Italics added.)

The agents told petitioner that they had been promised an operable gun by Ellner and put on a display of anger

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* References in parentheses preceded by the letter "A" refer to pages of Appellant's Appendix filed with the United States Court of Appeals for the Second Circuit.

and berated petitioner for offering them a welded gun (A35a-36a, A43a). Petitioner was unaware of such a promise and insisted that he did not have an operable gun, that all he had to sell was the welded gun "and *you* [the agents] can fix it up in no time at all" (A29a, A43a).

At this point, the informer "Frenchy" intervened and told petitioner (A46a-47a):

> "Look, kid, you're in a lot of trouble here. I'm in a lot of trouble too. I'm going to get myself killed too. You see, these fellows, they're associated with a racketeer by the name of Vincent Rao," he said, "I'm in trouble and you're in trouble too."
>
> I said "What am in trouble with?" I said.
>
> He says "Well," he said, "you know, these fellows, they want an operating gun."
>
> I said "I haven't got any operating gun, all I have is the plugged up gun."
>
> He said "It will take you a half hour, an hour to remove the barrel."
>
> I said "How do I remove the barrel?"
>
> He said "Get a new barrel and put the new barrel in it."
>
> I said "I don't want to get involved."
>
> He said "These fellows want a working gun."
>
> I said "I don't know anything about a working gun."
>
> He said "It doesn't make any difference. Make it look like it's working. We'll get rid of them."

The agents' display of anger, coupled with the informer's threats, finally overcame petitioner's will to resist. As he put it, "At this point I became scared, I became a coward, and I said I would try my best to change the barrel" (A47a). Petitioner "was afraid for my life" (A44a).

Petitioner was told to return at 10:30 p.m. that evening with an operable machine gun (A27a). He obtained a new

barrel from Ellner and replaced the plugged up barrel (A47a). When he met the agents later that evening with the altered gun in the trunk of his automobile, petitioner was arrested (A30a-31a).

The Government's undue delay in proceeding to trial.

At the time of petitioner's arrest on December 17, 1959, the Government possessed all of the facts and evidence required to prosecute. The original Indictment No. 61 Cr. 507, however, was not filed until May, 1961, almost one and one-half years later (A7a). This delay was not explained.

In January, 1963, the Government obtained a superseding indictment, No. 63 Cr. 28, predicated upon the identical facts as the earlier indictment but charging petitioner and his co-defendant with the additional crime of conspiracy. The Government did not explain why the alleged conspiracy count could not have been included in the original indictment or why it took almost two years to resubmit the evidence to another Grand Jury.

After another year of inactivity, the case was finally marked off the calendar by Judge Weinfeld on April 13, 1964. Petitioner never requested postponement of his trial and the Courts below were not told why the Government could or would not prepare this case for trial.

The case remained in limbo for the next two years until finally restored to the calendar and announced ready for trial in April, 1966, *six and one-half years after petitioner's arrest and five years after the filing of the original indictment.*

Petitioner moved to dismiss the indictment as soon as he was notified that the Government had restored the case to the trial calendar after years of inactivity. He renewed his motion at trial (A18a).

The admission of petitioner's testimony at the suppression hearing.

In May, 1962, a hearing was held on petitioner's motion to suppress the submachine gun which he claimed was taken from him as the result of an illegal search and seizure in violation of his Fourth Amendment rights.

The Government took the position that petitioner voluntarily removed the gun from the trunk of his car and gave it to the agents. In such case, of course, petitioner's consent would negate the claimed illegality. At the same time, since the Government claimed consent, there was no issue of probable cause involved. As Judge Sugarman noted, the outcome of the motion depended "entirely upon the facts as I believe them." Either petitioner consented or he did not.

Petitioner testified in support of the motion. His testimony on direct examination was only seven pages in length and was restricted solely to the events which occurred during his meeting with agents Kales and McVeigh at 10:30 p.m. on December 17, 1959.

During cross examination, *over repeated objections by defense counsel* (A37a-38a), the prosecutor was permitted to go far beyond the scope of the direct examination. He was allowed to interrogate petitioner on matters which were totally irrelevant to the motion to suppress in view of the Government's claim of consent. The objectionable questions were designed to extract incriminating admissions from petitioner for use at his subsequent trial. For example, petitioner was asked—and compelled to answer over objection—whether he activated the gun in question and made it workable by replacing the plugged barrel with an unplugged barrel. In other words, did he make a firearm within the meaning of the National Firearms Act.

At trial, defense counsel promptly interposed an objection when the prosecutor announced his intention to read

portions of petitioner's testimony given during the suppresion hearing into the record as part of the Government's case-in-chief (A37a).

Contrary to the interpretation of the Court below, defense counsel's constitutional objection was clearly intended to embrace any procedure whereby the prosecutor would be permitted to use petitioner's prior testimony against him. It was not thought necessary to renew the objection to each question and answer read by the prosecutor. The following colloquy shows counsel's position and his objection to the entire procedure (A37a-38a; see also pp. 621, 632-633 of typewritten minutes of trial):

> "Mr. Liebhafsky: If your Honor please, as of right now I plan to call no further witness on my direct case. However, I do plan to introduce certain portions of Della Rocca's testimony at the hearing before Judge Sugarman. That might take some time, it might run us past 4:30. I would like, if it is acceptable—whatever the Court feels—to adjourn now.
>
> The Court: How long do you think it would take?
>
> Mr. Liebhafsky: I do not know, your Honor. We might have to agee upon a procedure how it is going to be done.
>
> Mr. Lewis: Judge, of course, I have an objection and I think it is a very tenable one. I submit on a motion to suppress that that testimony is not admissible on the trial of an action.
>
> * * *
>
> Mr. Lewis: Because the purpose of a motion to suppress is to go to a legality of the search, and I think it has been held time and time again that particularly in cases where a defendant takes the stand and where he would not take the stand on the trial of the action, it is a deprivation of his constitutional rights."
>
> * * *

> "But when the defendant takes the stand and he does not testify at all about it on direct examination, and then you elicit answers from him so that you can utilize it on the trial of a case, if that is going to be the law, then I think that any lawyer worth his salt will not make any more applications for suppression, if there has to be a hearing of this sort, because you are putting your defendant in jeopardy."

The Trial Judge concluded that (A38a):

> "I think the defendant can get whip-sawed if the scope of cross examination of him on a suppression hearing is permitted to extend beyond the direct in this way, as it now appears to me it was permitted to extend, and if then his testimony on that suppression hearing, though it really did not relate to what he tried to adduce in order to suppress, may be used against him on the trial of guilt or innocence."

Accordingly, he directed the prosecutor not to read certain questions and answers which appeared on page 11 of the transcript and related to petitioner's activating the gun and changing barrels (A39a).

Inconsistently, and, we submit, erroneously, the Court permitted the prosecutor to read into evidence the remainder of petitioner's testimony. This included a portion from pages 17 and 18 of the transcript which repeated, almost verbatim, the prejudicial questions and answers appearing on page 11 which the Court had ordered stricken (A39a-40a). The importance of this testimony to the Government, and its prejudicial effect, is demonstrated by the prosecutor's repeated reference thereto and emphasis thereof during his summation to the jury, and his comparison of the testimony given by petitioner on the motion to suppress with that given at trial (see, *e.g.*, pp. 1116-18, 1139, 1144-45 of typewritten minutes of trial).

Reasons for Granting the Writ

1. The decision of the court below is directly contrary to this Court's recent decision in *Haynes* v. *United States*, —— U. S. —— (36 U.S.L.W. 4164), holding that a proper claim* of the constitutional privilege against self-incrimination provides a full defense to prosecutions for unlawful possession of a firearm under § 5851 of the National Firearms Act (26 U.S.C. § 5851).

In addition to the charge of unlawful possession (§ 5851), petitioner was indicted for violating other related provisions of the National Firearms Act pertaining to the transfer of a firearm without a written order form (§ 5814) and without paying the required tax (§ 5811). We submit that these latter provisions of the Act are also unconstitutional as applied to petitioner.

Section 5811(c) provides that the $200 tax which the transferor of a firearm is required to pay shall be represented by appropriate stamps. Section 5813 provides that these stamps shall then be affixed to the order form required to be completed and filed by Section 5814. Section 5814(b) requires the transferor of a firearm to set forth in the order form the manufacturer's number or other mark identifying the firearm which he is going to transfer. The statutory provisions are supplemented by comprehensive regulations which require, *inter alia*, advising the local chief of police of the intended transfer or making of a firearm (see summary of regulations in *Haynes* v. *United States*, —— U. S. ——, 36 U.S.L.W. 4164, 4165).

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* Prior to the commencement of his trial, petitioner unsuccessfully moved to dismiss the indictment upon the ground "that the provisions of the National Firearms Act upon which the charges were laid contravene the Fifth Amendment privilege against self-incrimination;" (A18a).

Under this statutory scheme, therefore, petitioner could not have paid the required tax or completed and filed the requisite forms without incriminating himself under New York law.

At the time of petitioner's arrest, Sections 1896-1898 of the New York Penal Law provided that any person who manufactured, *possessed* or disposed of a submachine gun was guilty of a felony. It is perfectly clear, therefore, that the disclosure required of petitioner in order for him to have complied with the applicable provisions of the National Firearms Act would have automatically incriminated him under New York law.

The Fifth Amendment privilege "has always been 'as broad as the mischief against which it seeks to guard'" (*Miranda* v. *Arizona*, 384 U. S. 436, 459-460), and the above provisions of the Act do not differ in any material respect from the unconstitutional possession and registration requirements. In each case the statute requires a person possessing or making a submachine gun or other firearm to disclose that fact to the authorities. This compelled disclosure is tantamount to a confession of a felony under New York law. The hazards of incrimination "can thus only be termed 'real and appreciable'" (*Haynes* v. *United States, supra* at 36 U.S.L.W. 4168).

We respectfully submit that this Court should declare that a proper claim of the constitutional privilege against self-incrimination also provides a full defense to prosecutions under these other related provisions of the Act, which are an integral part of the over-all statutory scheme.

2. The question of whether an accused's voluntary testimony at a suppression hearing is admissible against him at trial is presently before this Court in *Simmons* v. *United States*, 388 U. S. 906. The instant case presents a different and novel aspect of this question which is appropriate for this Court's consideration together with *Simmons*.

Unlike any other case which our research has disclosed (cf. *Heller* v. *United States*, 57 F. 2d 627) the damaging testimony in the case at bar was not voluntarily given by petitioner under guidance of his counsel. Rather, it was extracted from him by judicial compulsion over the repeated objections of his counsel. Moreover, it was introduced, over objection, as part of the Government's case-in-chief and not as impeachment (cf. *Walder* v. *United States*, 347 U. S. 62; *United States* v. *Curry*, 358 F. 2d 904).

In *Safarik* v. *United States*, 62 F. 2d 892, 897-898, the admission in evidence of *voluntary* statements made by a defendant in support of a motion to suppress was held violative of his constitutional rights. The Court held that:

> "While the Fourth Amendment guarantees protection against unreasonable searches and seizures, the Fifth Amendment guarantees protection against self-incrimination. At all stages of the trial defendants were entitled to the protection of both these guarantees. They protect all persons, including the accused, suspected, and guilty, as well as the innocent, and should be liberally construed in favor of the individual.
>
> • • •
>
> "If the government's contention be sustained, then the moment the defendants in this case made affidavits essential to the assertion of their rights under the Fourth Amendment, they became witnesses against themselves. To so hold would, for practical purposes, render unavailable the guarantees of both the Fourth and Fifth Amendments."

Similarly, in *People* v. *Luna*, 226 N. E. 2d 586, the Supreme Court of Illinois held that it was reversible error of constitutional dimension to permit the prosecutor to impeach defendant by using testimony which he voluntarily gave in support of his successful motion to suppress. As the Court stated:

> "In order to avail himself of his constitutional rights * * * defendant was compelled to move to suppress the confession. It also appears from the record that his testimony was essential on this motion. Defendant was therefore placed in the dilemma of either foregoing his constitutional right to a suppression of an unlawful confession, or of running the risk of his testimony being used against him at the trial. We think it is no answer to say that defendant need not have taken the stand at his trial. One ought not be forced to choose between availing himself of two equally valuable rights. (*Safarik* v. *United States*, 62 F. 2d 892)."

In an analogous situation following this Court's ruling in *Jackson* v. *Denno*, 378 U. S. 368, that New York's procedure for determining the voluntariness of a confession was unconstitutional, it has been held that

> "testimony given at a preliminary and separate proceeding is not a waiver of the constitutional privilege for the main trial * * * and that any admissions of a self-incriminatory nature obtained in a Jackson-Denno 'proceeding separate and apart from the body trying guilt or innocence,' may not be used at a subsequent trial of that charge * * *. The rationale of *Jackson* is that a defendant should be given the opportunity to contest voluntariness and testify at a separate hearing to secure and certainly not to endanger his rights for the main trial." (*People* v. *Huntley*, 49 Misc. 2d 209, 259 N.Y.S. 2d 369, 373.)

We submit that there is no validity to the various grounds given by the court below for rejecting petitioner's contention (see p. 21, *infra*). That the trial judge permitted the prosecutor to read into evidence only certain portions of petitioner's prior testimony does not cure the error. The portions read were highly prejudicial (A40a).

We do not understand the court's reference to defense counsel's opening remarks. They are not evidence. They did not contain the damaging and incriminating statements which the prosecutor was permitted to read into evidence. In any event, while it is customary for counsel to make an opening statement, surely no one would suggest that an accused is bound thereby and required to give testimony. He has the option of how to proceed with his defense, if any, after the close of the Government's case. Counsel's opening cannot be used to justify the Government's reading of petitioner's prior testimony into evidence during its case-in-chief.

Finally, in this connection, we have noted above that defense counsel clearly objected on constitutional grounds to any procedure whereby the prosecutor would be permitted to read portions of petitioner's prior testimony into evidence. This objection was intended and was understood to embrace the entire subject. There was no necessity for renewing it in connection with each question and answer read by the prosecutor.*

3. As noted above, petitioner was not tried until more than six and one-half years after his arrest and more than five years after the filing of the original indictment. As a matter of constitutional law this unexcused delay on the part of the Government constituted a denial of petitioner's Sixth Amendment right to a speedy trial (*United States* v. *Lustman*, 258 F. 2d 475, 478, cert. den. 358 U. S. 880). The Court below, however, held that petitioner had waived his right to a speedy trial by waiting to make his motion to dismiss until after the Government restored the case to the trial calendar.

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* The fact that counsel thereafter objected to a particularly prejudicial question (A39a) which he believed the court to have ruled on specifically, certainly was not intended as and should not be deemed to have been a waiver of counsel's over-all constitutional objection to the entire procedure.

This case, therefore, presents this Court with an opportunity to pass upon the question of whether it is not the Government's obligation to move an indictment for trial expeditiously so that an accused's silence and failure to demand an immediate trial cannot be deemed a waiver of his Sixth Amendment rights. While this Court has on several occasions denied certiorari in this type of case, it has never squarely ruled on this important question of constitutional law.

In *Carnley* v. *Cochran*, 369 U. S. 506, 513, this Court stated: "(I)t is settled that where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." This reasoning should apply with the same force to an accused's right to a speedy trial guaranteed by the opening words of the Sixth Amendment as it does to his right to counsel guaranteed by the last words of that Amendment. In each case it should be impermissible for the Court to presume the waiver of constitutional rights from mere silence (*Miranda* v. *Arizona*, 384 U. S. 436; *Carnley* v. *Cochran*, 369 U. S. 506, 516; *Johnson* v. *Zerbst*, 304 U. S. 458).

A minority of jurisdictions, including New York, have adopted a rule contrary to that prevailing in the federal courts (see, *e.g.*, *People* v. *Prosser*, 309 N. Y. 352, 130 N. E. 2d 891; *People* v. *Wilson*, 8 N. Y. 2d 391, 208 N.Y.S. 2d 963). As Judge Fuld so persuasively noted, the adoption of the New York rule merely imposes "upon the officers charged with enforcing the law and who secured the indictment, the quite reasonable, far from burdensome, duty of noticing it for trial." He rejected the suggestion that such a rule might enable a defendant to escape prosecution as "somewhat less than real," for the prosecutor "may at any time have the case placed on the calendar for a particular day" (*People* v. *Prosser*, *supra*, at p. 361).

It is completely unrealistic and fundamentally unfair to expect an accused to demand an immediate trial when the

Government's failure to proceed must indicate to him that the prosecution will probably be abandoned. This is particularly true where, as in the case at bar, the Government was in possession of all the facts and evidence it required to prosecute at the time of petitioner's arrest in December, 1959, and the subsequent delay was obviously not due to the necessity for further investigation. As Judge Weinfeld stated in granting defendant's motion to dismiss in *United States* v. *Dillon,* 183 F. Supp. 541, 543:

> "* * * I do not conceive it to be the duty of a defendant to press that he be prosecuted upon an indictment under penalty of waiving his right to a speedy trial if he fails to do so. It is the duty of the public prosecutor, not only to prosecute those charged with crime, but also to observe the constitutional mandate guaranteeing a speedy trial. If a prosecutor fails to do so, the defendant cannot be held to have waived his constitutional right to a speedy trial.
>
> "A waiver of a constitutional right is not to be lightly inferred. It must be clearly and intentionally made. Indeed, every reasonable presumption is indulged against a waiver of fundamental rights. Cf. *Glasser* v. *United States,* 315 U. S. 60, 70."

The intervening delay can never prejudice the Government, for if it actually is in possession of sufficient evidence to establish its case, it can move the indictment for trial whenever it chooses to do so. On the other hand, undue delay, attributable solely to the Government's reluctance to proceed, can gravely prejudice the defendant; for example, key witnesses required to establish the accused's defense may become unavailable, as in fact was the case with "Frenchy" in the case at bar.

It was obvious from the outset that "Frenchy" would be a vital witness for the defense. Accordingly, petitioner's co-defendant moved for a bill of particulars requiring the

Government to supply the defense with the name and address of "Frenchy". The motion was granted on May 16, 1963. The bill containing this information, however, was not furnished until 1966, almost three years after it was ordered (A26a). Even then, the Government maintained that it had no knowledge of the whereabouts of "Frenchy" whom it had identified as Charles Martel. In January, 1967, the prosecutor first advised petitioner's present attorney that "Frenchy" was an inmate of the Creedmoor State Hospital in Queens, New York (A26a).

The testimony of this key witness was lost to the defense because, at the time of trial, he was severely psychotic, paranoid, unable to distinguish between fact and fantasy and suffering from bizarre grandiose behavior (A48a-49a). In addition he had an angina condition which made it extremely dangerous for him to take the stand (A49a).*

In denying petitioner's motion to dismiss, the trial judge concluded that trial counsel made an effective argument on the basis of the witness' absence and that if "Frenchy" had taken the stand, his testimony would probably not have added much to the defense. We submit that there is a vast difference between testimony from a witness and argument, no matter how skillful, by counsel. The jury was obviously greatly troubled by the question of entrapment (A76a). Testimony from "Frenchy" corroborating petitioner, coupled with the agents' admissions that they did not want to buy a deactivated gun and put on "a show of anger" (A35a-36a, A29a) to induce petitioner to make the gun operable, would have had an incalculable effect on the jury.

It is respectfully submitted that the present federal rule is inconsistent with the absolute right to a speedy trial

* It strikes us as more than mere coincidence that the Government lost track of the informer for so many years and was unable to locate him until such time as his testimony was no longer available to the defense.

guaranteed by the Sixth Amendment and that as a matter of constitutional law as well as fundamental fairness, this Court should now reject it in favor of the New York rule. It should be sufficient, as it is in New York and other jurisdictions (see, *e.g.*, *People* v. *Prosser*, *supra*), for petitioner to have affirmatively raised the claim that his right to a speedy trial was violated either prior to or at the outset of trial.

The constitutional guarantee should be uniform in its application throughout the land and the right to a speedy trial should not have a different meaning for a defendant tried in the United States District Court for the Southern District of New York than for one tried directly across the street in the Supreme Court of the State of New York.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JEROME LEWIS,
Counsel for Petitioner.

JEROME LEWIS,
THOMAS R. NEWMAN,
Of Counsel.

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 129, 130—September Term, 1967.

(Argued October 20, 1967 Decided January 19, 1968.)

Docket Nos. 31565, 31566

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARTHUR DELLA ROCCA,

Defendant-Appellant.

Before:

WATERMAN, MOORE and HAYS,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York, Marvin E. Frankel, *Judge,* entered on a jury verdict convicting appellant of violation of the National Firearms Act, 26 U. S. C. §§ 5811, 5814 and 5851 and conspiracy to violate 26 U. S. C. §§ 5814 and 5821.

Affirmed.

JEROME LEWIS, New York, New York (Thomas R. Newman, New York, New York, on the brief), *for Appellant.*

DOUGLAS S. LIEBHAFSKY, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York and Pierre N. Leval, Assistant United States Attorney, on the brief), *for Appellee.*

HAYS, *Circuit Judge*:

This is an appeal from a judgment of conviction entered upon a jury verdict finding appellant guilty on four counts of two indictments: (1) transferring a firearm without paying the required tax in violation of 26 U. S. C. § 5811, (2) transferring a firearm without a written order from his transferee in violation of 26 U. S. C. § 5814, (3) possessing a firearm upon which tax had not been paid in violation of 26 U. S. C. § 5851 and (4) conspiring to violate 26 U. S. C. §§ 5814 and 5821. He was given a suspended sentence of eighteen months on each count and was fined five hundred dollars on the first count. We affirm the judgment.

The government's evidence tended to show that appellant and his former employer, Nicholas Ellner, met an informer known as "Frenchy" and undercover agents McVeigh and Kales on a Manhattan street corner on the evening of December 17, 1959. Appellant told agent Kales that he could get him anything he might need including flame throwers, bazookas, submachine guns, and fighter planes. He then produced a submachine gun which was inoperable because the barrel was plugged up with a weld and offered to sell the gun to the agents for $400. The agents demurred, saying that Ellner had promised an operable gun for $200 and started to leave. Appellant stopped them and after some discussion agreed to produce an operable gun later that evening. When he did so, he was arrested.

Appellant asserts that the provisions of the National Firearms Act under which he was convicted are unconstitutional in that they compel him to admit possession of a submachine gun, which is a felony under New York law.[1] It may be that under the Fifth Amendment a state cannot prosecute on the basis of evidence which the defendant was required by federal law to disclose. See *Murphy* v. *Waterfront Commission*, 378 U. S. 52, 79 (1964). However the mere danger that a state might institute such a prosecution cannot be used to excuse compliance with federal statutes which constitute the supreme law of the land. U. S. Const. art. VI, cl. 2.

Appellant also argues that he was denied his Sixth Amendment right to a speedy trial. He was arrested on December 17, 1959, but was not indicted until May 16, 1961,[2] and was not tried until March 20, 1967. Although he was represented by counsel at least as early as one month after his arrest, appellant did not move for a prompt trial until April, 1966. It is conceded that none of the delay after April, 1966 is attributable to the government. Appellant may not now complain of the delay prior to that

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[1] The registration provision of the National Firearms Act, 26 U. S. C. § 5841, has been held unconstitutional. See *Dugan* v. *United States*, 341 F. 2d 85 (7th Cir. 1965); *Russell* v. *United States*, 306 F. 2d 402 (9th Cir. 1962). See also *Lovelace* v. *United States*, 357 F. 2d 306 (5th Cir. 1966).

The Supreme Court, in *Haynes* v. *United States*, 372 F. 2d 651 (5th Cir.), cert. granted, 388 U. S. 908 (1967), will consider this term the constitutionally of the possession section, 26 U. S. C. § 5851, where the charge is possession of a gun which has not been registered under § 5841. In the present case appellant was charged not with possession of an unregistered gun but with possession of a gun upon which the tax required by § 5821 had not been paid.

[2] A second indictment, which added the conspiracy count, was filed on January 7, 1963.

date because he failed to demand an earlier trial. See *United States* v. *Lustman*, 258 F. 2d 475, 478 (2d Cir.), cert. denied, 358 U. S. 880 (1958); *United States* v. *Maxwell*, —— F. 2d —— (2d Cir. 1967) and cases cited therein at p. , footnote 2.

The trial court permitted the government to introduce into evidence portions of appellant's testimony given at a hearing on the suppression of the submachine gun. Appellant asserts that this ruling was error because it held in effect that by choosing to assert his Fourth Amendment rights appellant waived his Fifth Amendment right against self-incrimination. He points out that the prejudice in this case is particularly great since the judge at the suppression hearing permitted the government, over counsel's objection, to indulge in very broad cross-examination.

It may well be that an accused's testimony at a suppression hearing is not generally admissible against him at trial.[3] However appellant here cannot take advantage of such a rule if it exists. In the first place, the trial judge permitted the government to introduce only certain designated portions of the suppression hearing testimony. Second, almost all of the questions and answers which were introduced related to facts about which counsel in his opening statement had said appellant would testify at the trial, and appellant did so testify. Finally, no objection was raised to the single question and answer which could conceivably be held to be prejudicial to appellant. In light of the fact that counsel made successful objection to another question only one page earlier in the trial transcript, we hold that the alleged error has not been preserved for appeal. See *United States* v. *Indiviglio*, 352 F. 2d 276 (2d Cir. 1965) (en banc), cert. denied, 383 U. S. 907 (1966).

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[3] This issue is currently before the Supreme Court in *United States* v. *Garrett*, 371 F. 2d 296 (7th Cir. 1966), cert. granted sub nom. *Simmons* v. *United States*, 388 U. S. 906 (1967).

Finally, appellant argues that the trial judge should have directed his acquittal on the ground that the evidence established entrapment as a matter of law. On the contrary, there was substantial conflict in the testimony as to appellant's predisposition to commit the crime. The question was for the jury and was submitted to them under proper instructions.

Affirmed.

No. 1036

In the Supreme Court of the United States

October Term, 1957

[redacted], PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF [redacted] FOR THE [redacted] CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

[redacted]
Special Counsel,
Department of Justice,
Washington, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1105

ARTHUR DELLA ROCCA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on four counts charging violations of the transfer and making provisions of the National Firearms Act (26 U.S.C. 5811, 5814, 5821). The court of appeals affirmed (Pet. App. A).

Petitioner presents three questions for review in this Court. In substance, he contends that (1) in light of this Court's decision in *Haynes* v. *United States*, No. 236, this Term, decided January 29, 1968, his convictions are barred by the Fifth Amendment's privilege against self-incrimination, (2) the government's introduction at trial of testimony he gave in

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support of a pre-trial motion to suppress evidence violated his Fifth Amendment right not to incriminate himself, and (3) the delay in bringing him to trial violated his Sixth Amendment right to a speedy trial.

It is our view that petitioner has not demonstrated that he is clearly entitled to prevail on his constitutional contentions. *Haynes* v. *United States, supra,* decided only "that a proper claim of the constitutional privilege against self-incrimination provides a full defense to prosecutions either for failure to register a firearm under § 5841 or for possession of an unregistered firearm under § 5851." Different considerations may well be applicable in assaying the relevance of the Fifth Amendment to convictions for violations of the transfer and making provisions of the statute such as are involved here. Similarly, this Court's recent decision in *Simmons* v. *United States,* No. 55, this Term, decided March 18, 1968, does not necessarily control petitioner's claim that his earlier testimony was improperly introduced by the government at trial. Unlike the situation in *Simmons,* petitioner here took the stand at trial and testified regarding the matters to which his earlier testimony had related, and petitioner's counsel did not object to the specific testimony read into evidence, which in substance was cumulative and thus at least arguably not prejudicial. With regard to denial of the speedy trial claim, petitioner cites no authority to support the proposition that such a denial results where a defendant has acquiesced in the delay, was not incarcerated during the period, and can show no significant prej-

udice resulting from the delay—in spite of its substantial duration.

We do not urge, however, that petitioner's claims are insubstantial. Accordingly, we would indicate our acquiescence to the granting of certiorari were that the only feasible course which might be followed here. Since, however, the court of appeals' decision was rendered prior to this Court's decisions in both *Haynes* and *Simmons,* it seems appropriate that the court below be afforded an opportunity to reconsider its decision in light of those intervening holdings. Accordingly, without conceding the validity of petitioner's contentions, we respectfully suggest that this Court grant the petition for certiorari, vacate the judgment below, and remand the entire cause to the court of appeals for further consideration in light of the decisions in *Haynes* and *Simmons.*

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1968.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

DELLA ROCCA *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 1105. Decided April 29, 1968.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is vacated. The case is remanded to the United States Court of Appeals for the Second Circuit for further consideration in light of *Haynes* v. *United States*, 390 U. S. 85, and *Simmons* v. *United States*, 390 U. S. 377.